

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JERRY WAYNE SHUE, JR.,
Petitioner,
v.
D.K. SISTO, Warden,
Respondent.

) 1:05-CV-0504 AWI JMD (HC)
) ORDER ADOPTING FINDINGS AND
) RECOMMENDATION
) [Doc. #43]
) ORDER DENYING PETITION FOR WRIT
) OF HABEAS CORPUS
) ORDER DIRECTING CLERK OF COURT
) TO ENTER JUDGMENT
) ORDER DECLINING TO ISSUE
) CERTIFICATE OF APPEALABILITY

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

23 On September 24, 2008, the Magistrate Judge issued a [Findings and Recommendation](#) that
24 recommended the petition be DENIED with prejudice. The Magistrate Judge further recommended
25 that the Clerk of Court be DIRECTED to enter judgment. The Findings and Recommendation was
26 served on all parties and contained notice that any objections were to be filed within thirty (30) days
27 of the date of service of the order. More than thirty days have passed and no objections have been
28 filed.

1 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this Court has conducted a *de*
2 *novo* review of the case. Having carefully reviewed the entire file, the Court concludes that the
3 Magistrate Judge's Findings and Recommendation is supported by the record and proper analysis.

4 A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a
5 district court's denial of his petition, and an appeal is only allowed in certain circumstances. Miller-
6 El v. Cockrell, 123 S.Ct. 1029, 1039 (2003). The controlling statute in determining whether to issue
7 a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

8 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district
9 judge, the final order shall be subject to review, on appeal, by the court of appeals for
the circuit in which the proceeding is held.

10 (b) There shall be no right of appeal from a final order in a proceeding to test the
11 validity of a warrant to remove to another district or place for commitment or trial a
person charged with a criminal offense against the United States, or to test the validity
of such person's detention pending removal proceedings.

12 (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal
may not be taken to the court of appeals from--

13 (A) the final order in a habeas corpus proceeding in which the detention complained
14 of arises out of process issued by a State court; or

15 (B) the final order in a proceeding under section 2255.

16 (2) A certificate of appealability may issue under paragraph (1) only if the applicant
has made a substantial showing of the denial of a constitutional right.

17 (3) The certificate of appealability under paragraph (1) shall indicate which specific
18 issue or issues satisfy the showing required by paragraph (2).

19 If a court denies a petitioner's petition, the court may only issue a certificate of appealability
20 "if jurists of reason could disagree with the district court's resolution of his constitutional claims or
21 that jurists could conclude the issues presented are adequate to deserve encouragement to proceed
22 further." Miller-El, 123 S.Ct. at 1034; Slack v. McDaniel, 529 U.S. 473, 484 (2000). While the
23 petitioner is not required to prove the merits of his case, he must demonstrate "something more than
24 the absence of frivolity or the existence of mere good faith on his . . . part." Miller-El, 123 S.Ct. at
25 1040.

26 In the present case, the Court finds that reasonable jurists would not find the Court's
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1 determination that Petitioner is not entitled to federal habeas corpus relief debatable, wrong, or
2 deserving of encouragement to proceed further. Petitioner has not made the required substantial
3 showing of the denial of a constitutional right. Accordingly, the Court hereby DECLINES to issue a
4 certificate of appealability.

Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendation issued September 24, 2008, is ADOPTED IN FULL;
 2. The Petition for Writ of Habeas Corpus is DENIED with prejudice;
 3. The Clerk of Court is DIRECTED to enter judgment; and
 4. The Court DECLINES to issue a certificate of appealability.

2 || IT IS SO ORDERED.

Dated: November 7, 2008

/s/ Anthony W. Ishii

CHIEF UNITED STATES DISTRICT JUDGE